

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 302 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

STATE OF GUJARAT

Versus

ASHWINKUMAR MOHANBHAI THAKKAR

Appearance:

MR BY MANKAD, ADDL PUBLIC PROSECUTOR for appellant

MR VIJAY H PATEL for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL

Date of decision: 07/10/98

ORAL JUDGEMENT

State has preferred this appeal being aggrieved by an order of acquittal recorded on 19.12.1990 by Judicial Magistrate First Class, Bardoli in Criminal Case No. 1434 of 1988 wherein the accused were tried for offences punishable under section 498.A read with section 114 of the Indian Penal Code.

2. Respondents were prosecuted on a First

Information Report being lodged by Nitinbhai PW. 2, at Bardoli Police Station being Crime Register No. 70/88. It is disclosed in the FIR that informant Nitinbhai's younger sister Pragna @ Gita, aged about 19 years married Ashwinbhai, respondent No.2 herein on 20.2.1988, as per the customs prevailing in the community; After marriage, she used to reside at Bardoli with her husband and Chandraben, her Mother-in-Law, while her Father-in-Law was serving as a Teacher at Batsar and was thus staying away; On 19.3.1998 Pragna, in the company of her Mother-in-Law came from Bardoli to Bombay where the informant was residing, and she stayed for a day; During her stay, she disclosed to the informant in the presence of his wife, on being questioned, that she was being ill-treated by her husband as well as her Mother-in-Law; She complained that they were torturing her very frequently on the ground that she has not brought any article in dowry; Respondent No.3, who was ordinarily residing at United States came to India, who also tortured her in the presence of Chandraben; She was asked to bring dowry, i.e. T.V., Tape Recorder, Furniture and a sum of Rs.15,000/- and was threatened that she will not be allowed to enter the house if she returned without dowry; She complained to him that she was mentally tired and conveyed not to tell these things to their father because on coming to know, he would be very unhappy; Informant pacified Pragna and stated that as the situation improves, the articles as demanded will be given; After staying for a day, she went back to Bardoli in the company of her husband; Respondent No.3 was also staying at the relevant time at Bardoli with respondents No. 1 and 2.

2.1 The informant has further disclosed in the complaint that on 9.4.1988 he had gone to his native place, Anjar, where on 15.4.1988, his father's sister conveyed on telephone from Bombay that Pragna has expired at Bardoli and he was asked to reach Bombay immediately; In view of this information, informant reached Bombay on 16.4.1988; On reaching home, he was conveyed information that on 14.4.1988 during night hours, for some reasons, a liquid like Kerosene was consumed by Pragna and she expired at about 4.30 a.m. in the morning on 15.4.1998. In-laws of Pragna conveyed the news in the morning of 15.4.1988 and they went to Bardoli and after cremation, they returned to Bombay. It is also stated in the complaint that Hina, daughter of elder sister of informant's father, (i.e. cousin sister) got married before about three months with Satish, son of Nirmalaben, accused No.3 (aunt of accused No.1). (Cousin sister of complainant happened to be the wife of cousin brother of

accused No.1). Father of the informant was threatened that if police complaint is filed, Hina will not be accepted in the family, and, therefore, father did not file any police complaint; However, informant conveyed to his father what Pragna conveyed to him when she last met him at Bombay and it was clear that on account of the fact that demand for dowry was not satisfied, as alleged by the prosecution, she must have been compelled to commit suicide on account of mental torture.

2.2 On the information being lodged with police, police commenced investigation, and filed a charge sheet before the Judicial Magistrate, First Class, Bardoli for offences punishable under Section 498.A and 114 of the Indian Penal Code. Learned Magistrate, after taking cognizance, registered the case as Criminal Case No. 1434 of 1988 and issued process. After recording the evidence and hearing the submissions, the learned Magistrate acquitted the accused by judgment and order dated 19.12.1990.

3. Section 498.A of the Indian Penal Code reads as under :-

498.A. Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation: For the purpose of this section, "cruelty" means -

(a). any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or,

(b). harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

3.1 Reading the said section, it is very clear that it refers to cruelty to which a women is subjected by

husband or a relative of husband of such women. The explanation to this clause makes it very clear that a wilful conduct is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health, but this section does not deal with a situation where suicide is actually committed. Learned Magistrate, learned Assistant Public Prosecutor conducting the matter on behalf of the State and the defence counsel, all were aware about the fact that Pragna infact committed suicide within a very short span of her matrimonial life.

4. On account of increase in dowry death in the country, parliament inserted section 304.B in the Penal Code, which reads as under:-

304.B. (1). Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subject to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called 'dowry death', and such husband or relative shall be deemed to have caused her death.

Explanation : For the purpose of this sub-section, 'dowry' shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2). Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

4.1 It is not necessary that the death of a women must have been caused by burns or bodily injury; Even if it is pointed out that the death of a women occurred otherwise than under normal circumstances within seven years of her marriage and soon before her death she was subjected to cruelty or harassment by husband or by any relative of her husband for, or in connection with any demand for dowry, will be punishable as contemplated under section 304.B of the Act. It was the duty of the trial Court to read the First Information Report of Nitinbhai PW. 2 and other papers to find out whether *prima facie* case has been made out under section 304.B of IPC or not.

5. Section 306 of the Penal Code reads as under :-

"If any person commits suicide whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

5.1 The trial Court was required to consider the circumstances when a newly wedded wife committed suicide. What was the necessity for her to take the extreme step of committing suicide? The trial Court was required to refer the FIR and ascertain whether the accused persons had subjected the deceased to cruelty by constant tones and maltreatment. The suicide having been committed within a period of seven years from the date of her marriage, it was for the Court to presume under section 113.A of the Evidence Act having regard to all other circumstances of the case that such a suicide has been abated by the husband and his relations.

6. Section 113.A of the Indian Evidence Act, 1872 reads as under :-

"113.A. When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation: For the purpose of this section, "cruelty" shall have the same meaning as in section 498A of the Indian Penal Code (45 of 1860)."

6.1 It cannot be said that the trial Court was not aware about the death of Pragna because Charge, Exh. 5 framed by the trial Court, clearly indicates that accused No.1 and other two accused used to torture the deceased very frequently by stating that she has not brought dowry from her father and on account of that cruelty, on 14.4.1988, with a view to commit suicide, took poisonous substance, as a result of which she expired on 15.4.1988. It is the duty of the trial Court, at the time of framing the charge, to consider the papers and to

find out as to what offence is alleged to have been committed by the accused and it is also the duty of the trial Court to frame charge accordingly. Offences under section 304.B and 306 of the Penal Code are triable by Court of Sessions, and the Judicial Magistrate would have no jurisdiction to try the case. It clearly appears that though the offence alleged to have been committed was triable exclusively by the Court of Sessions, the learned Judicial Magistrate proceeded with the trial. Neither the Assistant Public Prosecutor nor the defence counsel even drew the attention of the trial Court about the procedure being followed.

7. Mr. Patel, learned advocate appearing for the accused-respondents submitted that the trial Court has appreciated the evidence and has acquitted the accused for offences punishable under section 498.A r.w. 114 of the Penal Code, and, therefore, the question of considering that the trial is not in accordance with law should not come in the way of the accused as the accused faced the trial and were acquitted on appreciation of evidence. On pointing out certain circumstances, learned Additional Public Prosecutor and learned advocate Mr. Patel stated that the Court may not decide the matter on merits and evidence on record need not be appreciated for considering the question whether offence under section 306 or u/s 304.B of the IPC is made out or not.

8. Learned advocate appearing for the accused submitted that principle of autrefois acquit will apply in view of section 300 (1) (2) of the Criminal Procedure Code. In his submission, on the same facts, the accused cannot be tried again. In the instant case, sub-clauses 1 and 4 of section 300 are relevant, which are reproduced hereunder:-

300(1). A person who has been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of section 221 or for which he might have been convicted under sub-section (2) thereof.

(4). A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be

subsequently charged with, and tried for, any other offence constituted by the same acts which he may be committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(Underlined by me).

8.1 In the instant case, if the trial would have been before a Court of Sessions, viz. the competent Court to hear and determine the case and to record a verdict of conviction or acquittal, the situation would have been different. In the instant case, learned JMFC was not competent to try the accused for either an offence punishable under section 304.B or section 306 of the Indian Penal Code. Therefore, as contemplated under section 300 of the Criminal Procedure Code, a person though acquitted of an offence, notwithstanding such acquittal, can be subsequently charged with and tried for any other offence on the same facts alleged to have committed if the Court by which he was first tried was not competent to try the offence with which he is to be subsequently charged. In the instant case, as the accused were tried for an offence punishable under section 498.A r.w. section 114 of the Indian Penal Code, they can be subsequently charged with and tried for an offence punishable under section 304.B or section 306 of the Indian Penal Code on the same facts as earlier they were tried by a Court which was not competent to try offences punishable under section 304.B and 306 of the Indian Penal Code.

8.2 Section 300 (1) of CRPC comes into aid of accused only if the accused were tried by a Court of competent jurisdiction for an offence and were acquitted or convicted of such offence, and while such acquittal remains in force, the accused will not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of section 221 or for which they might have been convicted under sub-section (2) thereof.

8.3 The accused were tried for minor offences by a court of competent jurisdiction to try minor offences. However, on the same facts, when major offence appears to have been committed, for such major offences accused could not have been convicted by the Court which tried the accused as that Court was not competent to try for major offence. Under the circumstances, trial by a Magistrate cannot be used as a shield to avoid the trial for major offences for which only Court of Sessions could

have tried the accused.

8.4 The Apex Court in the case of BAIJ NATH PRASAD vs. STATE OF BHOPAL reported in AIR 1957 SC 494 pointed out as under in paragraph 5 of the judgement.

"Now it is necessary to state that the point taken by learned counsel for the petitioners is really concluded by three decisions - (a) one of the Privy Council, (b). another of the Federal Court, and (c). the third of this Court itself. The Privy Council decision is in Yusofalli Mulla v. The King, AIR 1949 PC 264 (A) the Federal Court decision in Basdeo Agarwalla v. King Emperor 1945 FCR 93 : (AIR 1945 FC 16). (B). and the decision of this Court (not yet reported) was given in Budha Mal v. State of Delhi, Cri. Appeal No. 17 of 1952 D/- 3.10.1952 (C). The Privy Council decision is directly in point, and it was there held that the whole basis of S. 403 (1) was that the first trial should have been before a Court competent to hear and determine the case and to record a verdict of conviction or acquittal; if the Court was not so competent, as for example where the required sanction for the prosecution was not obtained, it was irrelevant that it was competent to try other cases of the same class or indeed the case against the particular accused in different circumstances, for example if a sanction had been obtained. So is the decision of this Court where the following observations were made with regard to the point in question:

"Section 403, Criminal Procedure Code, applies to cases where the acquittal order has been made by a Court of competent jurisdiction but it does not bar a retrial of the accused in cases where such an order has been made by a Court which had no jurisdiction to take cognizance of the case. It is quite apparent on this record that in the absence of a valid sanction the trial of the appellant in the first instance was by a magistrate who had no jurisdiction to try him." "

(Sec.403 of the old Code corresponds to Sec.300 of the present Cr.P.C.)

8.5 The Apex Court, in the case of MOHD. SAFI vs. STATE OF WEST BENGAL reported in AIR 1966 SC 69, in paragraph 5, while discussing section 403 of the Code (old), pointed out as under :-

The provisions are based upon the general principle of autrefois acquit recognised by the English Courts. The principle on which the right to plead autrefois acquit depends is that a man may not be put twice in jeopardy for the same offence. This principle has now been incorporated in Art. 20 of the Constitution. The defence of autrefois acquit, however, has no application where the accused person was not liable lawfully to be convicted at the first trial because the Court lacked jurisdiction. From the language used in S. 403 (1) of the Code it is clear that what can be successfully pleaded as a bar to a subsequent trial for the same offence or for an offence based on the same facts is that the accused had been (a). tried by a Court, (b). of competent jurisdiction, and (c). acquitted of the offence alleged to have been committed by him or an offence with which he might have been charged under S. 236 or for which he might have been convicted under S. 237 of the Code."

The Apex Court also pointed that :

" The competence of a Court, however, depends not merely on the circumstance that under some law it is entitled to try a case falling in the particular category in which the offence alleged against the accused falls. In addition to this, taking cognizance of the offence is also material in this regard. Under the Code of Criminal Procedure, a Court can take cognizance of an offence only if the conditions requisite for initiation of proceedings before it as set out in Part B of Chapter XV are fulfilled. If they are not fulfilled, the Court does not obtain jurisdiction to try the offence."

In paragraph 8 of the Judgment, the Apex Court further pointed out that :-

"In addition to the competence of the Court, S. 403 of the Code speaks of there having been a trial and the trial having ended in an acquittal. It would be only repetition to say

that for proceedings to amount to a trial they must be held before a Court which is in fact competent to hold them and which is not of opinion that it has no jurisdiction to hold them. A fortiori it would also follow that the ultimate order made by it by whatever name it is characterised cannot in law operated as an acquittal. "

8.6 Thus, it is very clear that prima facie the accused were required to be tried for an offence punishable under section 304.B or Section 306 of the Penal Code, which are triable by Court of Sessions. The accused have not been tried by a court of competent jurisdiction for these offences. The accused can be tried on the same facts notwithstanding the fact that there is an order of acquittal recorded by Judicial Magistrate First Class for offences punishable under section 498.A and section 114 of the Indian Penal Code.

9. In view of the aforesaid position, Mr. Patel, learned advocate requested the Court not to discuss the matter on merits for considering the case whether the acquittal is proper or not as the findings or observations made by this Court may adversely effect either the prosecution or the accused.

9.1 Under the circumstances, without discussing the matter on merits as requested by the learned Advocates, the order of acquittal is quashed and set aside. Judicial Magistrate First Class, Bardoli is directed to follow the procedure laid down under section 209 of the Criminal Procedure Code as the case is triable exclusively by the Court of Sessions.

9.2 JMFC Bardoli is directed to commit the case to the Court of Sessions within a period of fortnight from the receipt of the record from this Court. The Court of Sessions, after receipt of the record from the JMFC shall proceed with the trial at the earliest, and in any case shall dispose of the case within a period of three months from the date of receipt of record, without being influenced by this order setting aside the order of acquittal, and shall decide the case on merits.

9.3 The direction to dispose of the case within a time frame is required to be given because of the peculiar nature of the case and that the case is an old one.

This appeal stands allowed accordingly.

csm./ -----